(2)

No. 84-1480

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections
State of Florida

PETITIONER,

v.

DAVID WAYNE GREENFIELD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 18,
1985; CERTIORARI GRANTED MAY 13, 1985.

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RECORD ENTRIES

1. David Wayne Greenfield was charged by information with sexual battery committed with force likely to cause serious personal injury on June 26, 1975. (SR 1, 2).*

2. Greenfield pled not guilty on July 11, 1975. (SR. 3).

3. Greenfield changed his plea to not guilty by reason of insanity on August 15, 1975. (SR. 4).

4. Jury verdict of guilty was entered on October 15, 1975.

5. Greenfield was adjudicated guilty and sentenced to life imprisonment in an order filed November 21, 1975. (SR 7).

*References to the State trial record have been designated SR followed by the appropriate page number.

6. Second District Court of Appeal affirmed judgment and sentence on September 24, 1976 and denied rehearing on October 25, 1976. Greenfield v. State, 337 So.2d 1021 (Fla. 2 DCA 1976). (JA 56 - 66).

7. Florida Supreme Court granted certiorari on March 7, 1977 and remanded the case to the Second District for proceedings consistent with Clark v. State, 363 So.2d 331 (Fla. 1978)(JA 67 -68).

8. Second District Court of Appeal reaffirmed its original opinion on October 1, 1979).(JA 69 - 70).

9. Greenfield filed a habeas corpus petition in the United States District Court for the Middle District of Florida on March 11, 1980. (R 1).

10. The United States District Court denied the habeas corpus petition on

January 25, 1983. (R 185).

11. Petitioner filed a timely notice of appeal to the Eleventh Circut Court of Appeals. (R 188)

12. The United States Court of Appeals for the Eleventh Circuit filed its opinion on September 6, 1984 and denied rehearing on January 28, 1985. (JA 4 - 46).

David Wayne GREENFIELD, etc.,

Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, etc., et al.,

Respondents-Appellees.

No. 83-3111.

United States Court of Appeals,

Eleventh Circuit.

September 6, 1984.

Petitioner sought habeas corpus relief following state court conviction. The United States District Court for the Middle District of Florida, William J. Castagna, J., denied relief, and he appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that prosecutor's argument to jury that petitioner's postarrest silence showed him to be sane violated his Fifth and Fourteenth

Amendments right to a fair trial.

Reversed with instructions.

1. CRIMINAL LAW 1036.1(3)

Defendant's failure to object at trial to admission of his post*Miranda* warning silence as substantive evidence to rebut his insanity defense did not preclude his right to seek apellate review of the evidence's admissibility where he later made 20 objections to prosecutor's attempt to argue that evidence to the jury.

2. CRIMINAL LAW 407(1)

Defendant's post*Miranda* warning silence was inadmissible as substantive evidence to rebut his defense of insanity at time of offense, as it was not probative of defendant's sanity, and his assertion of insanity, through psychiatric testimony, made no reference to his conduct at

time of arrest and did not constitute perjury, so that door was not opened to prosecutor's use of his silence. U.S.C.A. Const.Amends. 5, 6

3. HABEAS CORPUS 113(12)

Court of Appeals must find a constitutional error harmless beyond reasonable doubt before it can affirm district court's denial of writ of habeas corpus.

Appeal from the United States District Court for the Middle District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

David Wayne Greenfield was convicted after a jury trial in Florida state court of sexual battery committed with force likely to cause serious personal injury.

He was sentenced to life imprisonment. In this habeas corpus action, he raises one issue, whether the prosecutor's argument to the jury that Greenfield's post-arrest silence showed him to be sane violated his fifth and fourteenth amendments right to a fair trial. The district court denied relief; we reverse.

I.

On June 21, 1975, petitioner was walking on a path through the woods to Lido Beach, near Sarasota, Florida. He passed a young woman coming from the beach, who smiled and said something to him about the weather. After he passed her, he turned and choked her from behind, dragged her into the woods and forced her to engage in oral sex. Afterwards he made several inconsistent statements, among them: "I don't know why I did this. I

know why I did this." He smoked a cigarette that belonged to the woman and then found her car keys for her.

After Greenfield released her, the woman drove directly to the police station and made a report, describing petitioner's attire and saying that his legs were badly sunburned. An officer returned to the beach two hours after the assault and found petitioner walking on the beach. He told petitioner he was investigating a crime that had occurred on the beach and asked petitioner to raise his pants legs. Upon seeing that petitioner's legs were burned, he placed petitioner under arrest. Petitioner voluntarily walked to the police car and, after being advised of his Miranda rights, stated that he wanted to speak to an attorney. Otherwise he was silent. Later that day, when another

officer again advised petitioner of his rights and asked him if he wished to talk, petitioner only stated that he wanted to speak with an attorney. After speaking with a public defender, petitioner once again declined to talk with the police.

Petitioner was charged with sexual battery, Fla.Stat.Ann. §794.011(3)(1975), and pled not guilty. He later changed his plea to not guilty by reason of insanity. He went to trial on October 15, 1975. In petitioner's opening statement to the jury, his attorney indicated that he would put the prosecution to its proof of the events and, as a defense, would produce evidence of his client's insanity.

[1] In its case-in-chief, the prosecution called the victim, the investigating police officers, and the doctor who examined the victim shortly after the

assault. Two of the officers testified that petitioner had requested a lawyer after being advised of his Miranda rights, but had otherwise remained silent. The defense made no objection to this testimony.[1] At the close of the state's case petitioner moved for a judgment of acquittal. The court denied the motion.

The defense called two psychiatrists, Drs. Lose and Piotrowski, both of whom testified that petitioner had demonstrated classic symptoms of paranoid schizophrenia

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1 Under these circumstances the petitioner's failure to object to the introduction of this evidence did not preclude his right to seek appellate review of the evidence's admissibility because he later made 20 objections to the prosecutor's attempt to argue the evidence to the jury. This can be inferred from the Florida District Court of Appeal's willingness to address the merits of the admissiblity issue during its review of the prosecutor's closing argument to the jury. See Greenfield v. State, 337 So.2d 1021, 1022-23 (Fla.Dist.Ct.App. 1976).

during their interviews with him. Each doctor stated that in his opinion petitioner was not able to distinguish right from wrong at the time of the alleged crime.[2] Dr. Lose mentioned that he had prescribed thorazine, a drug that diminishes the symptoms of schizophrenia, for petitioner while he was in prison. Schizophrenics can tolerate the drug in substantial amounts; normal individuals given such dosages become extremely drowsy. Petitioner responded positively to the treatment.

In rebuttal, the state called a psychiatrist who testified that in his

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2 In its charge to the jury at the end of the trial, the court instructed the jury to find the defendant legally insane if he was "by reason of mental infirmity unable to understand the nature of his act or its consequences or was incapable of distinguishing that which is right from that which is wrong."

opinion petitioner was not a paranoid schizophrenic and was able to distinguish right from wrong at the time he committed the offense. The psychiatrist based this opinion on his examination of petitioner, conducted while petitioner was under the influence of thorazine. He testified, however, that thorazine would have made petitioner's symptoms worse rather than better. After the rebuttal, petitioner renewed his motion for a judgment of acquittal, which was denied.

In his summation to the jury, the prosecutor presented, over petitioner's objection, the following argument:

> Let's go on to Officer Pilifant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow [petitioner] on the beach and that he went up to him, talked to him, and then arrested him for the offense. The fellow voluntarily

> put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws [sic] of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Mranda [sic] rights. Does he say he doesn't understand them? Does he say "What's going on?" No. He says "I understand my rights. I do not want to speak to you. I want to speak to an attorney." Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down--as going down the car as you recollect Officer Pilifant said he explained what Miranda rights meant and the guy said--and Mr. Greenfield [the petitioner] said "I appreciate that, thanks a lot for telling me that." And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley--He's down there. He says, "have you been read your Miranda rights?" "Yes, I have." "Do you want to talk?" "No." "Do you want to talk to an attorney?" "Yes." And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant . . .

> So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity.

The jury found the petitioner guilty as charged, and the judge sentenced him to life imprisonment. Petitioner moved the court for a new trial or judgment of acquittal notwithstanding the verdict, citing the prosecutor's comment on petitioner's post arrest silence. The court denied the motion.

Petitioner appealed his conviction to the Florida Second District Court of Appeal, contending in part that the trial court erred in denying his motion for a new trial based upon the prosecutor's use of petitioner's post-Miranda warning silence. The court affirmed the conviction. Greenvield v. State, 337 So.2d 1021 (Fla. Dist.Ct.App. 1976). The Florida Supreme Court granted certiorari and remanded the

case to the district court of appeal for further proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978).[3] The district court of appeal reaffirmed its original opinion. Petitioner then filed this petition for a writ of habeas corpus in the federal district court.

After hearing evidence regarding whether Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), barred consideration of the post-arrest silence issue, the magistrate recommended to the district court that the issue not be

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3 In Clark v. State, 363 So.2d 331 (1978), the Florida Supreme Court held that improper comments on the defendant's exercise of his right to remain silent is "constitutional error," but not "fundamental error." Accordingly, a contemporaneous objection at trial to the introduction of or comment upon such evidence is required to preserve the issue for appeal.

considered barred by Wainwright v. Sykes, since the state appellate court had reached the merits of petitioner's claim, but that it be dismissed on the merits. Petitioner timely filed objections to the recommendation. The district court adopted the magistrate's recommendations and denied the petition.[4] This appeal followed.

II.

In Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the Supreme Court held that the prosecutor's use of the defendant's post-arrest, post-Miranda warning silence, not as evidence

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4 The district court made no findings of fact; rather, it determined from the record of his state trial proceedings that petitioner's claim was insufficient as a matter of law. Accordingly, we examine the record of the state trial proceedings, as did the district court, to determine whether petitioner was denied the constitutional right now in issue.

of guilt,[5] but solely to impeach the credibility of the defendant's alibi testimony violated the due process clause of the fourteenth amendment. The Court gave two reasons for its holding. First, a defendant's silence has low probative value because it is "insolubly ambiguous." 426 U.S. at 617, 96 S.Ct. at 2244. The ambiguity arises because Miranda

> require[d] that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights.

Id. Second, the Miranda warnings should

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5 Even the dissenters in Doyle agreed that the evidence was inadmissible to show guilt; in their opinion it could only be used to attack the defendant's credibility.

not be read to impose a hidden penalty on one who chooses to rely on them.

> [W]hile it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation [of the crime] subsequently offered at trial.

Id. at 618, 96 S.Ct. at 2245 (footnote omitted). These two concerns[6] provide

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[6] The problem of the extent to which a person can be compelled to incriminate himself testimonially without fifth amendment protection, see Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)(fifth amendment does not protect defendant against compelled "self-incrimination" by seized blood sample), is related. Petitioner's silence here should not be analyzed as behavior showing physical evidence of sanity. Unlike the physical evidence in Schmerber (blood), silence is inextricably tied to the testimonial option which the fifth amendment protects, that is, the option

the framework within which we must judge petitioner's claim.

The Supreme Court has placed some gloss on the right articulated in Doyle. In Doyle itself the Court noted that testimony that a defendant had remained silent would be admissible to rebut the defendant's story that he had spoken with police after his arrest. In Jenkins v. Anderson, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), the Court held that the admissibility of pre-arrest, pre-Miranda warning silence to impeach the defendant's

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not to incriminate oneself testimonially. Silence may not technically be "testimonial" or "communicative"; however, neither is it physical evidence. It occupies a unique place in that it shows a mental decision not to be testimonial or communicative. If such "conduct" is not protected, no fifth amendment protection would exist. There would be no alternative to self-incrimination. One would simply choose whether to incriminate himself by inference from silence, or by verbal means.

testimony in a state court proceeding is a state evidentiary law question; admission of the evidence would not violate the U.S. Constitution because the implicit assurance of the Miranda warning was not present In Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982), the Court similarly held that the admissibility of post-arrest, but pre-Miranda warning statements to impeach the defendant's testimony did not violate the fourteenth amendment but was rather a state evidentiary decision. The Court has not discussed the issue we now face: the admissibility of a defendant's post-Miranda warning silence when offered not to impeach, but, rather, as substantive evidence to rebut his defense of insanity at the time the offense. In evaluating this claim, we first examine the extent to

which the two factors relied upon by the Doyle court are present in this case.

A.

[2] We first examine the probative value of the evidence. The State argues here that petitioner's silence and request for a lawyer was highly probative of his sanity. We are not convinced.

Insanity is a broad term convering a variety of mental and emotional diseases or defects that prevent the criminal from formulating the requisite punishable intent when he commits a criminal act. The level of lucidity under which an insane person operates may vary with time. Symptoms of insanity also vary widely, with the specific disease and with time, ranging from complete withdrawal (which is often marked by silence) to violent rages. A person's apparent level of comprehension

may not always correspond to his level of sanity at the time. Accordingly, the probative value of a person's post-arrest, post-Miranda warning silence in determining his sanity at the time of the crime will vary markedly with the disease he has, the symptoms he tends to exhibit, and the closeness in time between the arrest and warning and the crime.

Here two psychiatrists considered petitioner to be a paranoid schizophrenic. At trial, psychiatric testimony suggested that such a person is often quiet. Paranoid schizophrenics, the doctors noted, are often capable of spawning complex, rational plans of action, although they operate under delusions. For example, the State's psychiatrist noted that a paranoid schizophrenic might dream up an elaborate, coherent plan to murder his neighbor,

based on the delusion that the neighbor was a KGB agent trying to assassinate him. For petitioner to have consistently asked for a lawyer and refused to speak with police, then, might only reflect his paranoia that the authorities were persecuting him even though he was innocent.

As the Supreme Court of Florida noted in finding post-arrest, post-Miranda warning silence not probative of insanity:

> [T]hese ambiguities attendant to post-Miranda silence do not suddenly disappear when an arrestee's mental condition is brought into issue . . [o]ne could reasonably conclude that custodial interrogation might intimidate a mentally unstable person into silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on . . . a Miranda warning.

State v. Burwick, 442 So.2d 944, 948 (Fla. 1983), cert. denied, __ U.S. __, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984). In this case, the evidence was probative only

of petitioner's ability to understand English[7] and to remain calm, which would be consistent with the mental disease of paranoid schizophrenia. The evidence accordingly was not probative of petitioner's sanity.

B.

We next turn to the concern expressed by the Supreme Court in Doyle that the defendant not be penalized for exercising his right to silence in view of the implicit assurance the Miranda rights give that, if the arrestee chooses not to speak, his silence will not be used against him. This concern was reiterated

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[7] Had petitioner's particular disorder been that he considered himself to be the literary Don Juan and understood only Spanish when he was in a delusional period, the probative value of his response to the officer's English warnings would have been much higher.

in Fletcher, 455 U.S. at 607, 102 S.Ct. at 1312, where the Court stated that "the sort of affirmative assurance embodied in the Miranda warnings" gives rise to a due process violation when post-warning silence is used by the prosecutor.

We first note that nothing in the Miranda "assurances" given to petitioner limited them to the instance where guilt, rather than insanity, would be the trial issue. In this respect petitioner's situation was identical to that of Doyle. Petitioner's silence was used against him at trial after he asserted his right to silence. He received no prior indication that he could be so penalized for maintaining silence; indeed, in the Miranda warnings he was implicitly assured that he would not be so penalized.

Further, petitioner's silence was not

admissible under the well-established exception noted in Doyle, that otherwise inadmissible evidence may come in where the defendant takes the stand and perjures himself regarding such evidence, 426 U.S. at 619, n. 11, 96 S.Ct. at 2245, n. 11; for petitioner never testified that he did not remain silent. Petitioner's assertion of insanity, through psychiatric testimony, made no reference to his conduct at the time of the arrest, did not constitute perjury, and therefore did not open the door to the prosecutor's use of post-Miranda silence as permitted by Doyle.

C.

Having examined both factors emphasized by the Doyle Court in the context of the facts before us, we discuss how they should be synthesized. The Seventh and Tenth Circuits, in analyzing similar

situations, have decided that the Doyle decision is inapposite in the context of an insanity defense. The Seventh Circuit has so held explicitly, Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983); the Tenth Circuit, in United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), cert. denied, 439 U.S. 858, 99 S.Ct. 175, 58 L.Ed.2d 166 (1978), has implicitly agreed.[8]

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[8] It is interesting to note that the two cases Trujillo relied on for its conclusion that post-Miranda silence or requests for a lawyer are admissible to show sanity do not directly support that conclusion. One, United States v. Julian, 450 F.2d 575 (10th Cir. 1971), specifically states that admission of post-arrest silence to show mental competence would have "a completely false premise in fact or law." Id. at 579. The court permitted evidence of the defendant's conduct at the time of his arrest only when the defense psychiatrist testified that the defendant "was trying to be arrested," because the

In Trujillo, a government agent testified that he read Trujillo his Miranda rights, Trujillo requested a lawyer, the agent continued to question Trujillo, and Trujillo told the agent his name, social security number, education, and parents' addresses. The government apparently never argued at trial that Trujillo's responses should be considered evidence of his sanity. The court of appeals determined, however, that the evidence was properly admitted because it was pertinent to the insanity claim, noting that in these circumstances, including that "the government did not exploit post-arrest silence,"

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defendant's conduct tended strongly to show that he was not trying to be arrested. In the second case, United States v. Coleman, 501 F.2d 342 (10th Cir. 1974), the defendant never challenged the admission of his post-arrest silence and request for a lawyer. Both of these cases were decided prior to Doyle.

the danger of unfair prejudice [was] minimal and the probative value substantial." Id. at 288.

The Sulie court employed a more lengthy analysis. There, the prosecutor called an officer to testify that the petitioner, after receiving the Miranda caution, requested a lawyer. The evidence was used to show that the petitioner was sane at the time he committed the crime. The court of appeals used a two-prong test in approving the evidence. First, it decided without examining the particular circumstances of that defendant's illness that the probative value, to show petitioner's sanity, of the evidence that petitioner requested a lawyer was "great." 689 F.2d at 131. Second, it examined "how much the exercise of the right to remain silent would be deterred if a suspect knew

that a request for a lawyer could be used as evidence of his sanity." Id. at 130. The court concluded that, since few defendants raise an insanity defense and fewer still are planning their defenses when they are arrested, the suspect's knowledge that his request for a lawyer could be used against him to show his sanity would have only a slight inhibiting effect on the exercise of the right to counsel. Noting that the prosecution needed all the evidence of sanity it could get, the court found the testimony to have been properly admitted.

We disagree with the conclusion of both appellate courts that evidence of a post-Miranda warning silence or counsel request is generally highly probative of sanity at the time of the offense. We also disagree with the appropriateness,

after Doyle, of the Sulie court's second inquiry.

The Sulie court analyzed the probative value of the request as follows: "Where evidence that the defendant asked for a lawyer is used to prove . . . guilt, its probative value is slight (it is not true that only a guilty person would want to have a lawyer present when he was being questioned by the police); but here it was great." 689 F.2d at 131. The flaw in this logic--as the record in this case shows--is that it is not necessarily true that only a sane person wants a lawyer present when he is being questioned by the police. An excessively paranoid individual, in particular, may want any protection from the police that he can get. As we have previously stated, probative value of the conduct to show sanity in part

depends on the nature of the alleged insanity, and, in most circumstances, we cannot conceive that the probative value as to sanity would be significantly greater than the probative value as to guilt or as to credibility in asserting an alibi defense.

The second point analyzed in Sulie, what impact use of post-Miranda conduct to show sanity may have on criminal suspects in general, sidesteps the point made in Doyle. The particular suspect, having been implicitly assured that his silence will not be used against him at all and quite likely relying on that assurance, is penalized at trial for exercising his right to remain silent when his silence is used against him as evidence of his sanity. It might well be that, if suspects were told that their post-Miranda warning

silences could be used to show their sanity, most suspects would pursue the same course of action. However, until and unless we correctly set out for the particular suspect how his right is limited, we penalize him for exercising his right to silence by an after-the-fact assertion of a limitation on the right. We agree with Judge Cudahy's dissent in Sulie that the appropriate inquiry in this type case is not whether defendants generally will be inhibited from exercising their fifth amendment rights, but rather whether the particular defendant has been penalized for exercising such rights and whether he has been harmed by the penalty. This is consistent with the position taken by the Supreme Court in Doyle, where the Court focused on whether Doyle himself had been harmed, not on the broad inhibitory

effects on the right to remain silent. Similarly, in Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that a prosecutor could not comment on a defendant's failure to testify at trial because it imposed a penalty on his exercise of his fifth amendment privilege not to incriminate himself. 380 U.S. at 619, 85 S.Ct. at 1232. The Court did not look at the inhibitory effect of prosecutorial comment on defendants exercising the right generally. The Third Circuit described the proper inquiry to be "whether the particular defendant has been harmed by the state's use of the fact that he engaged in constitutionally protected conduct, not whether, for the particular defendant or for persons generally, the state's reference to such activity has or will burden

the exercise of the constitutional right." United States ex rel. Macon v. Yeager, 476 F.2d 613, 616 (3rd Cir.), cert. denied, 414 U.S. 855, 94 S.Ct. 154, 38 L.Ed.2d 104 (1973) (emphasis in original).

In this case, we feel that adherence to the Doyle analysis is appropriate and that it requires us to send petitioner back to the state courts for retrial. Petitioner exercised his rights to remain silent and to request counsel. He did so in circumstances having no more probative value as to sanity than the circumstances in Doyle had as to guilt; in both situations the silence was "insolubly ambiguous." Petitioner exercised his rights to silence and to counsel after receiving the same implicit assurance Doyle received that his silence would not be used against

him.

Moreover, as we have pointed out, unlike in Doyle, petitioner did not take the stand. Any use of his silence was as substantive evidence against him, a use that even the Doyle dissenters would have decried. This case can not fall under the exception of a defendant using the fifth amendment as a shield for perjury because the defendant never took the stand. His experts likewise did not place his conduct at the time of his arrest directly in issue in the opinions they expressed.[9]

[3] We now turn to the question of whether the prosecutor's argument

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9 We do not determine, here, if or when such silence might appropriately be used to impeach on cross-examination a defense psychiatrist who raised the defendant's behavior with police at the time of or after his arrest and Miranda warning as evidence of insanity. We note only that this issue is not presented in this case.

constituted harmless error. We must find a constitutional error harmless beyond a reasonable doubt before we can affirm the district court's denial of the writ. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The prosecutor relied strongly on the petitioner's conduct as evidence of sanity; his closing argument was not lengthy and the portion challenged here was not minor. We cannot say that the error was harmless beyond a reasonable doubt.

The judgment of the district court is reversed. On remand, the district court shall issue the writ, calling for the state to retry the petitioner within a reasonable time (to be determined by the district court) or to discharge him.

REVERSED, with instructions.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3345

DAVID WAYNE GREENFIELD,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary
Florida Department of
Offender Rehabilitation

Respondent-Appellee

Appeal from the
United States District Court
For the Middle District of Florida
Tampa Division

PETITION FOR REHEARING

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CERTIFICATE OF INTERESTED PARTIES

Not applicable. See 11th Cir. R. 22(f)(2).

ARGUMENT AND AUTHORITIES

COMES NOW the Respondent/Appellee, LOUIE L. WAINWRIGHT, by and through the undersigned Assistant Attorney General and pursuant to Rule 40, Federal Rules of Appellate Procedure, and 11th Cir. R. 26, petitions this Court for rehearing in the above styled cause and as grounds therefore alleges that this Court failed to give due consideration to the applicability of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) in the case at bar.

It is beyond dispute that Petitioner never contemporaneously objected to the testimony of Officers Jolley and Pilifant regarding Petitioner's post-Miranda

conduct. It is only when the prosecutor argued this evidence to the jury that Petitioner's counsel saw fit to object -- once (T.R. 339). This Court has stated, in its opinion in this cause:

> Under these circumstances the Petitioner's failure to object to the introduction of this evidence did not preclude his right to seek appellate review of the evidence's admissibility because he later made 20 objections to the prosecutor's attempt to argue the evidence to the jury. Greenfield v. Wainwright, __ F.2d __ (11th Cir. 1984) at slip opinion p. 5147, footnote 1.

While Respondent questions the conclusion that the mere nuber of subsequent objections can excuse a non-compliance with Florida's contemporaneous objection rule and thus avoid the Wainwright v. Sykes bar, Respondent must also note that a review of the record discloses one not twenty trial objections to the prosecutor's argument on this point. That objection is contained at page 339 of the state trial

transcript. The trial transcript further reflects Petitioner's failure to move for a mistrial at the time the allegedly improper argument was made.

It is clear, as a matter of Florida law that if a defendant, at the time an improper comment is made, does not move for mistrial, he cannot, after trial, in the event he is convicted, expect a reversal on appeal. A defendant will not be allowed to await the outcome of the trial with the expectation that if he is found guilty, his conviction will be automatically reversed. Clark v. State, 363 So.2d 331 (Fla. 1978).

The failure of a litigant to raise a claim at trial or on direct appeal in accordance with the procedural requirements imposed by the state will preclude consideration of that claim by the Federal

District Courts in a habeas corpus proceeding brought pursuant to U.S.C. §2254. Wainwright v. Sykes, supra; Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 7823, 102 S.Ct. 1558 (1982), reh. denied, 73 L.Ed.2d 1296 (1982); Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983); Hall v. Alabama, 700 F.2d 1333 (11th Cir. 1983); Forman v. State, 633 F.2d 634 (2nd DCA 1980), cert. denied, 450 U.S. 1001 (1981) and Grizzell v. Wainwright, 692 F.2d 722 (11th Cir. 1982). This is true whether the default occurred at trial and/or appeal and extends to constitutional as well as non-constitutional claims. Engle v. Isaac, supra.

Respondent has consistently argued that the Second District Court of Appeal addressed the merits of Petitioner's claim only in the alternative, after first

noting Petitioner's failure to object to the testimony of Officers Pilifant and Jolley. See Greenfield v. State, 337 So.2d 1021 (Fla. 2d DCA 1976). On remand the district court reaffirmed its original opinion and held that it was consistent with Clark v. State, supra. Since Clark expounds the contemporaneous objection rule under discussion it is not reasonable to assume that the Second District Court of Appeal would find its decision consistent with Clark unless it had, in fact, considered Petitioner's claim not properly preserved for appellate review.

Respondent would respectfully urge this court to re-examine the record and the procedural history of this cause and hold that Petitioner's claim is barred by Wainwright v. Sykes, supra, due to his failure to object to the officers'

testimony and his failure to timely move for a mistrial.

CONCLUSION

Based on the foregoing argument and authorities, Appellee respectfully requests that this Court grant rehearing in the above-styled cause.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

[s] Ann Garrison Paschall
ANN GARRISON PASCHALL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR
RESPONDENT/APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James D. Whittemore, Esquire, 412 Madison Street, Suite 1207, Tampa, Florida 33602, this 24th day of September, 1984.

[s] Ann Garrison Paschall
OF COUNSEL FOR
RESPONDENT/APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3111

DAVID WAYNE GREENFIELD,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, et al.,

Respondent-Appellees.

Appeal from the United States Court
For the Middle District of Florida

ON PETITION FOR REHEARING
(September 6, 1984)

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

PER CURIAM:

The petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

[s]
UNITED STATES CIRCUIT JUDGE

(Order Filed January 28, 1985)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DAVID WAYNE GREENFIELD,
#051271,

Petitioner,

vs CASE NO. 80-290-CIV.T.WC.

LOUIE L. WAINWRIGHT,
Secretary, Department
of Corrections, State
of Florida,

Respondent.

REPORT AND RECOMMENDATION

THIS CAUSE came on for consideration of a petition for writ of habeas corpus filed by as State prisoner, DAVID WAYNE GREENFIELD, pro se, in forma pauperis, pursuant to 28 U.S.C. §2254.[1]

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[1] This matter comes before the undersigned pursuant to the Standing Order of this Court dated April 6, 1979. See also Local Rule 6.01(c)(17).

On June 26, 1975 in Case No. 75-425-CF-A-01 in the Circuit Court in and for Sarasota County, Florida, Petitioner was charged by information with sexual battery committed with force likely to cause serious personal injuyr, contrary to §794.02 (2), Fla. Stat. (1975). On October 15, 1975, Petitioner was convicted after jury trial. He was adjudicated guilty and on November 21, 1975 was sentenced to life imprisonment.

Petitioner originally entered a plea of not guilty. Subsequently, his attorney entered a change of plea to not guilty by reason of insanity.

On October 16, 1975, Petitioner filed a motion for new trial or in the alternative for a judgment notwithstanding the verdict. He argued that the court had erred in allowing the prosecutor to

comment on the defendant's refusal to give a statement to police officers after the defendant was advised of his Miranda warnings and right to remamin silent. The trial court, after hearing argument, denied the motion.

On direct appeal, Petitioner contended that the trial court erred in refusing to grant a motion for new trial on the ground that the prosecutor had commented on his exercise of his right to remain silent during closing argument. The Second District Court of Appeal affirmed Petitioner's conviction with a written opinion. See, Greenfield v. State, 337 So.2d 1021 (2d DCA 1976); rehearing denied October 25, 1976. The Florida Surpeme Court, upon a petition for writ of certiorari, granted certiorari and remanded the case back to the Second District Court of

Appeal for further proceedings consistent with its decision in Clark v. State, 363 So.2d 331 (Fla. 1978). See Greenfield v. State, 364 So.2d 885 (Fla. 1978). Thereafter the Second District Court of Appeal affirmed its original opinion. See, Greenfield v. State, unreported Order entered October 1, 1979, copy in file.

This petition for writ of habeas corpus followed. Counsel was appointed to represent the indigent Petitioner and a Pre-Trial Stipulation was entered. Respondent does not contend that Petitioner has failed to exhaust available State remedies.

The sole issues raised by the parties are:

a. Whether Petitioner was denied due process of law by the prosecutor's use of and reference to defendant's post-

arrest silence during 1) trial and 2) final argument; and

b. Whether the holding in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), bars review of Petitiner's claim.

The facts in this case, simply stated, are that Petitioner, identified and arrested shortly following a sexual assault, upon receiving Miranda warnings, requested an attorney and made no statement. The prosecutor elicited testimony of the officer disclosing Petitioner's request for counsel in an attempt to overcome Petitioner's defense of insanity. Petitioner claims violation of his rights under Doyle v. Ohio, 426 U.S. 610 (1976). Respondent claims an exception to the Doyle rule under Harris v. New York, 401 U.S. 222 (1971).

Only one fedeal appellate court panel has met this issue squarely. In Sulie v. Duckworth, __ F.2d. __ (7th Cir. 1982), 32 Cr.L. 4046, under material facts the same as in the instant case, the court held the state may show that a defendant who raises the insanity defense was sufficiently lucid to ask for a lawyer, outweighing the slight effect this testimony will have on the constitutional right of silence. (A copy of the Sulie opinion is attached hereto as Appendix 1). Based on the Sulie decision, and the reasoning of the majority expressed therein, I recommend that the petition be DENIED.[2]

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[2] Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. 636(b)(1). Local Rule 6.02; Nettles v. Wainwright, 677 F.2d 404, (5th Cir. 1982)(en banc).

Respondent also seeks dismissal of Petitioner's claim for failure to object at time of trial. The record is clear that the Petitioner did object to the prosecutor's closing argument reference to Petitioner's request for counsel and failure to make any other statement. The record is further clear that the Florida Second District Court of Appeals reached the merits of Petitioner's claim both in the original opinion and upon remand. Accordingly, the Petitioner is not barred from raising the issue in this Court.

This 29th day of October, 1982.

[s]
PAUL GAME, JR.
UNITED STATES MAGISTRATE

(Appendix one to Magistrate Game's opinion is omitted by Petitioner.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DAVID WAYNE GREENFIELD,

Petitioner,

vs. CASE NO. 80-290-CIV-T-WC

LOUIE L. WAINWRIGHT,

Respondent.

ORDER

This cause came on for consideration of a petition for writ of habeas corpus filed by a State prisoner, David Wayne Greenfield, pro se, in forma pauperis, pursuant to 28 U.S.C. §2254.

The matter was considered by the United States Magistrate, pursuant to general order of assignment, who has filed his report recommending that the petition be denied.

Upon consdieration of the report and

recommendation of the Magistrate and upon this Court's independent examination of the file, the Magistrate's report and recommendation is adopted and confirmed and made a part hereof. Therefore, it is

ORDERED:

1. The petition for writ of habeas corpus is denied.

DONE AND ORDERED at Tampa, Florida this 25th day of January, 1983.

[s]
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT
JULY TERM, A.D. 1976

DAVID WAYNE GREENFIELD,

Appellant,

v. CASE NO. 75-1731

STATE OF FLORIDA,

Appellee.

Opinion filed September 24, 1976

Appeal from the Circuit
Court for Sarasota County;
Roy E. Dean, Judge.

Jack O. Johnson, Public Defender,
Robert H. Grizzard, II, Assistant
Public Defender, and Paul J. Martin,
Legal Intern, Bartow, for Appellant.

Robert L. Shevin, Attorney General,
Tallahassee, and William I. Munsey,
Jr., Assistant Attorney General,
Tampa, for Appellee.

McNULTY, Chief Judge.

On this direct appeal appellant

Greenfield assails his conviction of sexual battery. The sole issue on appeal relates to the denial of a motion for new trial predicated on the ground that the prosecutor prejudicially commmented in summation on appellant's exercise of his right to remain silent at the giving of his Miranda rights at the time of his arrest. We affirm.

Most significantly, in this case, appellant pleaded not guilty by reason of insanity. Accordingly, there was no real dispute as to the essential objective facts herein. They are that the prosecutrix, having sunned hereself on a local beach in Sarasota in the late morning or early afternoon on the day of the offense, was returning to her car because of the threat of rain. It was necessary that she pass through a wooded area bordering the

beach. While in this wooded area she was accosted by appellant and dragged to a more secluded area of the beach where the sexual assault occurred. Upon her release by appellant the prosecutrix drove immediately to the police station and reported the incident, describing appellant. A police officer promptly returned to the scene of the assault and in the vicinity thereof spotted appellant as one fitting in considerable detail the description given by the prosecutrix. He arrested appellant and read him his Miranda rights.

The officer testified that he explained these rights, that appellant thanked him for explaining the, and that appellant said he understood them and did not wish to speak to the officer until he spoke to an attorney. Shortly thereafter at the police station appellant was again

interviewed by other officers, again reminded of his rights and again he reiterated that he did not wish to speak to the officers, that he wanted to speak to an attorney. In fact, he was permitted to and did call an attorney. No objection was made to the introduction of this evidence relating to the giving of the Miranda rights and to appellant's responses thereto.

During closing arguments, however, the prosecutor made the following comments:

> "But let's go on from what she stated. Let's go on to Officer Pilafant who took the stand, who the psychiatrists, both defense psychiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car.

This is supposedly an insane person under the throes of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say 'What's going on?' No. He says 'I understand my rights. I do not want to speak to you. I want to speak to an attorney.' Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. Even down--as going down [in] the car as you recollect Officer Pilafant said he explained what Miranda rights meant and the guy said--and Mr. Greenfield said 'I appreciate that, thanks a lot for telling me that.' And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley--he's down there. He says, 'Have you been read your Miranda rights?' 'Yes, I have.' 'Do you want to talk?' 'No.' 'Do yo want to talk to an attorney?' 'Yes.' And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant."

At this point, counsel for defendant

strenuously objected on the basis that such comments were improper references to appellant's insistence on his Fifth Amendment right to silence. We cannot agree.

While we do agree that, at least in the face of an objection, testimony or prosecutorial comment relating to a defendants insistence on his right tc remain silent generally constitutes reversible error,[1] we are of the view that under the circumstances of this case the general rule ought not apply.

When insanity is raised by plea as a defense, and evidence thereof is forthcoming prima facie sufficient to raise a

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[1] Shannon v. State (Fla. 1976), __ So.2d __ (Case No. 47-611, Opinion filed June 30, 1976); Bennett v. State (Fla. 1975), 316 So.2d 41; Clark v. State (Fla. App. 2d, 1976) __ So.2d. __ (Case No. 74-889, Opinion filed July 28, 1976).

reasonable doubt, the state no longer can travel on the presumption of sanity; it must establish sanity beyond a reasonable doubt as with every element of the offense charged.[2] Certainly, evidence of the conduct and apparent state of mind and awareness of an accused, particularly where, as here, it is connected closely in point of time to the crime charged, is relevant to this issue; and it would be manifestly unfair to permit a defendant prima facie to establish a defense and then preclude the state from meeting it by barring relevant evidence to the contrary because of the "Miranda" rationale.[3]

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2 See, e.g., Farrell v. State (Fla. 1958), 101 So. 2d 130; Byrd v. State (Fla. App. 2d, 1965), 178 So.2d 886.

3 Cf. Harris v. New York (1971), 401 U.S. 222, 91 S.Ct. 643.

Here, for example, the evidence relied upon by the state was perhaps the most competent evidence on appellant's mental capacity at the time of the offense available, being so closely connected to the res gestae. It was neither unfair to introduce it[4] nor improper to comment upon it in summation; and, though considered in a somewhat different context (i.e., with respect to a defendant's right to silence during a psychiatric evaluation ordered by the court), we concur with the

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4 No issue is made herein about the postural sequence in which the evidence came in. That is, the evidence came in during the state's case in chief before there was any evidence from the appellant as to his insanity. But no objection was made at the time. So, by objecting to prosecutorial comments thereon during sumation, the appelalnt is in no different position than he would have been in had such evidence been introduced in rebuttal, when it would have been, as we hold here, proper.

observations of Mr. Justice Adkins in Parkin v. State:[5]

> "When the plea of not guilty by reason of insanity was entered, it was done so with knowledge of the existing statutes and case law on the subject. There is no constitutional right to plead this defense, and, if the statutes and case law permit a defendant the privilege of raising it, he must waive certain constitutional rights with respect to it, including the privilege against self-incrimination. . .

In view whereof, the judgment and sentence appealed from should be, and they are hereby, affirmed.

HOBSON, J., CONCURS.

GRIMES, J., DISSENTS WITH OPINION.

GRIMES, J.,dissenting.

There is considerable logic in Judge McNulty's opinion. Yet, it is an appreciable step beyond Harris v. New York in

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5 (Fla. 1970), 238 So.2d 817.

which the U.S. Supreme Court held that when a defendant took the stand he could be cross-examined on inconsistent statements he had given to the police in violation of his Miranda rights. That decision was based upon the premise that a person should not be entitled to commit perjury and at the same time hide behind the constitutional right to remain silent.

Here, there is no question of perjury because the appellant did not take the stand, and I canot equate interposing a defense of insanity with the giving of perjured testimony. The testimony of Officer Pilafant, had it been objected to, and the comments of the prosecutor in closing argument, which were objected to, would require reversal under Bennett v. State, supra. The fact that this evidence was probative on the sanity issue cannot

deprive appellant of his constitutional protections.

Moreover, had the state been conscious of the possibility that Pilafant's testimony might result in a violation of Miranda principles, the problem could have been avoided with a minimum of prejudice to the state's case. The questions and answers could have been couched in such a manner as to permit the officer to convey to the jury the fact that the appellant carried on a perfectly rational conversation without specifically stating that he chose to avail himself of his right to remain silent.

In view of the present posture of the law on this subject, I must respectfully dissent.

IN THE SUPREME COURT OF FLORIDA
TUESDAY, SEPTEMBER 12, 1978

DAVID WAYNE GREENFIELD,

Petitioner,

v. CASE NO. 50,565

STATE OF FLORIDA, DISTRICT COURT OF APPEAL, SECOND DISTRICT 75-1731

Respondent

ORDER

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal in Greenfield vs. State, 337 So.2d 1021 (Fla. 2 DCA 1976). Certiorari is granted and this case is remanded for further proceedings consistent with our recent decision in Clark v. State, Case No. 50,336 (opinion filed July 28, 1978).

ENGLAND, C.J., OVERTON, SUNDERBERG, HATCHETT and ALDERMAN, JJ., Concur
ADKINS and BOYD, JJ., Dissent

A True Copy cc: Hon. William A. Haddad, Clerk
TEST: Hon. R.H. Hackney, Jr., Clerk
by: [s] Hon. Roy E. Dean, Chief Judge
Chief Deputy Clerk

Sid J. White Hon. Jack O. Johnson
Clerk William I. Munsey, Jr. Esquire
Supreme Court Mr. David Wayne Greenfield

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

OCTOBER 1, 1979

DAVID WAYNE GREENFIELD,

Appellant,

v. CASE NO. 75-1731

STATE OF FLORIDA,

Appellee.

Pursuant to the order of the Florida Supreme Court remanding this case for further proceedings consistent with Clark v. State, 363 So.2d 331 (Fla. 1978), and it appearing that this court's decision in the above-styled case is consistent with Clark v. State, supra, upon consideration, it is

ORDERED that this court's prior affirmance herein is hereby adhered to.

A TRUE COPY
TEST:

[s] William A. Haddad

CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: Jack O. Johnson
Attorney General
Hon. R.H. Hackney, Jr.
David Greenfield
Hon. Sid J. White

EXCERPT FROM THE DIRECT EXAMINATION
OF OFFICER RUSSELL PILIFANT

[Officer Pilifant]

A. I had probable cause to believe the subject was the suspect of the alleged crime. I placed him under arrest.

[James Slater, Assistant State Attorney]

Q. After you placed him under arrest did he say anything to you?

A. No, sir. He--Except that I wanted him to get his face down into the sand, which he says "I don't need to." He put his hands behind his back, which I handcuffed.

Q. And after you handcuffed him what did he do?

A. I proceeded back to my cruiser which was parked at the north parking lot. At the time I got him back to the cruiser I proceeded to pat him down, since I could not do this on the beach for my own

safety. I patted him down, which I found an object which I thought resembled a knife in his left front pocket, but to my disclosure it wasn't in his jeans but in another what I believe was a jean-type material inside his jeans which later proved to be jean cut offs.

Q. All right. Did you find something in those jean cut-offs?

A. Yes, sir. I did. I found a knife.

Q. What did you do after you found the knife?

A. I put that in the front seat. I set him down in the back seat and I read him his Miranda warnings off my Miranda Card.

Q. Do you have that card with you today?

A. Yes, I do.

Q. Would you read us exactly what your read to Mr. Greenfield?

A. I explained to him this is the Miranda warning. "You have a right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand each of these rights I have explained to you? Having these rights in mind do you wish to talk to us now?"

Q. When you asked him "did you understand these rights" what did he state?

A. He stated yes, he did.

Q. And when you asked him the question if he wanted to talk to you at this time what did he say?

A. No, he did not. He wished to talk to an attorney first.

Q. Is that the exact words he used?

A. Lawyer, sir.

Q. After he said he wanted to talk to a lawyer what did you do?

A. I proceeded to put him in the car in the back seat, shut the door. After I read him the Miranda warnings I called into the station I'd be en route to the station with the prisoner of this alleged crime. On the way in I explained to him again exactly the crime which did occur. I explained to him again that he also remembers to have the right to have an attorney before he makes any statements

or questions.

Q. What did he day to that?

A. "Thank you very much. I appreciate you explaining this to me."

Q. What occurred upon your arriving - or, did anything else, any other conversation, occur while you were going to the police station?

A. No, sir.

Q. Upon arrival at the police station what did you do?

A. Okay. I proceeded up to the booking officer, which time Detective Meredith and Detective Jolley --

Q. All right. Did he talk to you at any time at booking?

A. No, sir. We asked him at that time if--I--I'm not sure exactly who asked him the question. But he--I know he stated to me personally that he did not

wish to make any statements at the time, wanted to talk to a lawyer.

[SR 76 - 79]

EXCERPT FROM THE DIRECT EXAMINATION OF OFFICER JOLLEY

[James Slater]

Q. After you observed the defendant and what he was wearing and his description what did you proceed to do?

[Officer Jolley]

A. I asked Officer Pilafant if he had advised the defendant of his constitutional rights. He replied that he had. I then asked the defendant if he had been advised of his constitutional rights. He replied yes. I asked him at that time if he understood these constitutional rights. He replied yes. I asked him if he wished to give up the right to remain silent and talk to me about this case. He replied, "No, I want to talk to an attorney." At that time no further questions were asked.

Q. Did you proceed to booking at

that time?

A. Yes, sir. We proceeded at that time to take some physical evidence from the defendant during the booking process.

Q. All right. Did you ever take photographs of the defendant?

A. Yes, sir. Detective Meredith in my presence took photographs of the defendant.

Q. Detective Jolley, I ask you to look at state's exhibit marked for identification 12, 1 through 6 consecutively, and ask you to identify those, please.

A. Yes, sir. These are the photographs taken of the defendant in the booking room.

Q. Were you present when these photographs were taken?

A. Yes, sir. I was.

Q. And do the accurately portray

the pictures which were taken?

A. Yes, sir. They do.

MR. SLATER:

Your Honor, at this time I would move to introduce these six photographs as state's exhibit number 12.

THE COURT:

Mr. Stewart.

MR. STEWART:

Yes. At this time I would object on the basis that there is no connection between the photos and the scene of the crime.

THE COURT:

Objection is overruled. They may be received.

Q. (By Mr. Slater)

After obtaining what physical evidence you obtained what did you proceed to do?

A. We proceeded with the booking of the defendant. At this time we asked him if he desired attorney. We informed him that if he desired one or could not afford one one would be appointed for him free of charge at that time, and asked him that if he desired to speak with an attorney at that time. He replied yes. We telephoned the number for the public defender's office and a man answered, identified himself as an attorney, Larry Staub, and the phone was handed to the defendant.

Q. All right. After the conversation between the defendant and his attorney what occurred?

A. I then again asked the defendant if after having spoken to his attorney if he desired again to give up the right to

remain silent, and at this time talk to me about the case. He again replied No.

[SR 95 - 98]

CLOSING ARGUMENT OF JAMES E. SLATER,
ASSISTANT STATE ATTORNEY

MR. SLATER:

Good Afternoon. As the judge informed you, this is the closing argument, and as the judge also informed you this is not to be taken into consideration as far as the guilt or innocence of the parties--in other words, to be taken as facts to make the determination. It is argument. It is argument that will be used by myself and my Mr. Stewart. It may be used for persuasive value only, but not to be taken into consideration as to what the facts were.

If during my closing argument I should mis-state any of the facts regarding the testimony, please--that is my error. I apologize to you in the beginning about that. Remember it as you

recollect it, taking--taken from the stand. That is the sole way you should remember it for the determination in this case of sanity or insanity or guilt or innocence.

If I may begin by starting out and talking a little bit about the law in this case, because this--as we've had so far all the facts have been presented to you. What is upcoming is the law that Judge Dean will read you. I would like to go over very briefly with you what the law is in regards to sexual battery, which is a recently enacted statute in the State of Florida.

The defendant is charged in the crime of sexual battery likely to cause serious personal injury, and if I may read you the law in regards to that. It says it is the crime of sexual battery committed with

physical force likely to cause serious personal injury when a person commits a sexual battery upon a person over the age of eleven years old without the person's consent and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury.

Now, let me talk about what the definition of sexual battery is. Definition of sexual battery is any oral, anal, or vaginal penetration of another by any other object. However, sexual battery does not include acts for bona fide medical purposes. Then going down here, as I stated earlier, it says "Likely to cause serious personal injury." It defines serious personal injury and says--the definition of serious personal injury is great bodily harm or pain or permanent disability or permanent disfigurement.

The state contends and the state has shown beyond a reasonable doubt that the defendant, David Greenfield, by his actions, by his choking the victim into unconsciousness, has used actual physical force likely to cause personal injury. The statute was created just for this sort of situation where there has been injury and there has been force used that could cause injury without the use of a weapon. And what other more devastating physical force could be used than the choking of an individual around the throat? So therefore based upon all the facts and the evidence shown in this case and from the testimony of Tiana Parr and from the photographs that you will see in the--in the jury room and the testimony of Dr. Kamstock beyond a reasonable doubt that this individual did commit the crime of sexual

battery likely to cause serious personal injury.

But also along with that, if I may add, the judge will also advise you as to the lesser included offenses under this sexual battery laws, and that will include a sexual battery commited by threat or force. Let me read to you very briefly what that is. Is it is a crime of sexual battery by threat or force when a person commits a sexual battery upon a person over the age of eleven without the person's consent under the following circumstances: When the victim is physically helpless to resist--we don't have that situation; when the offender coerces the victim to submit by threatening to use force or violence likely to cause personal--serious personal injury on the victim, and the vicitm reasonably believes the

offender has the present ability to execute these threats. In other words, he coerces the individual into doing. Well, in this case we don't have that. He physically did place his hands and physically assaulted the victim. Third, when the offender coerces the victim to submit by threatening to retaliate against the victim or any other person and the victim reasonably believes that the offender has the ability to execute these threats in the future. We don't have that situation, either. He did not threaten to do it. He did do it. It will go again to define retaliation, physically helpless. But again we don't have that situation in this case at all, by the facts presented.

The next lesser included offense is a sexual battery committed with force not likely to cause serious personal injury,

and I read you very briefly that. Says it is a crime of sexual battery committed with force not likely to cause a serious personal injury of a person who commits a sexual battery upon another person over the age of eleven years without the person's consent and in the process thereof uses physical violence and force not likely to cause serious personal injury. Again by looking at all the facts presented in this case of course this case does not come under that situation bacause he did use force in this case, he used force likely to cause permanent or serious injury. So what we have here is the individual who has been charged and according to the facts presented he did commit sexual battery, to which he is charged, which is a sexual battery likely to cause serious personal injury.

Along with that there will be instructions as to assault with intent to commit sexual battery, attempted sexaul battery, neither of which we have because we don't have any attempts or assaults because we actually do have a sexual battery. A bare assault and assault. I felt advisable to state these. There is no indication that this individual commited any other act besides the act which he is charged with.

Now, further in the jury instructions there will be instructions in regards to insanity, and I feel I must go over this with you very briefly also. It'll state what insanity is, and when a person is considered insane, criminally insane. And the instructions will state this. Under the law a person is sane and responsible for his crime if he has sufficient mental capacity to understand what he is doing

to understand that his act is wrong. If at the time of the alleged crime a defendant was by reason of mental infirmity unable to understand the nature of his act or the consequences or was incapable of distinguishing that which is right from that which is wrong he was legally insane and should not be convicted.

Now, I think you should pay particular attention to this because as alleged by the defendant and as alleged by his psychiatrist they state at the time he committed this act he did not know the difference between right and wrong, nor the consequesces of his act. But let us look at the facts in regards to this case in the determination of guilt or innocence, because that is the only indication we can use as jurors to indicate guilt or innocence in this case as far as

sanity is concerned.

All right. Let's go, if we can go, to the testimony of the victim, the first one--Officer Lerer was just a property officer. Let's go to the crux of the matter. Tiana Parr. Tiana Parr took the stand and very difficultly went through the testimony regards to what happened to her that day. And I don't believe there's been any evidence to contradict the fact that this happened. There's been no evidence at all regards to that, so there's no question about the sexual battery occurred.

Of course, the total question in this case is sanity or insanity. And how do we judge sanity or insanity at the time an act is committed? Not a month and a half later, not two months later, but at the time it was committed. Well, of course

you cannot delve into a person's mind and read the way they're thinking. So how else do you determine a person's thinking at the time? Well, you determine it by his actions and by his words. And in this case I think both the actions and the words are totally indicative of an individual who did know what he was doing. And let's take those words, as I recollect them, from Tiana Parr.

The big thing defense attorney says and psychiatrists say at the time he committed the act he was insane because he made the statement "I don't know why I did it, yes, I know why I did it." But unfortunately we cannot take any comment out of context of the entire situation, and that's what I believe the evidence proved what the psychiatrist were doing. They would take that one little statement and

nothing else. But what they failed to realize is what else was going on at that time. He stated that and then after that he states "I'm sorry, I didn't mean to do it." Now, if a person didn't know he did something wrong why would he say "I'm sorry I did it"?

Go back to the definition of insanity. It says didn't know the difference between right and wrong and didn't know the consequenes of his act. Defense would have us believe that this guy didn't know he did something wrong, but from his own statements he says "I'm sorry," and when someone states they're sorry I think they state it because they know they have done something wrong to someone else. So that in itself indicates he knew his act was wrong.

But further on to that what else did he say? Well, the victim said "I won't tell anybody if you don't do anything to me, anything further to me." Because he first said he didn't know what to do with her after he committed the act. She says, "Well, I won't tell anybody." All right. So he says--he goes along with that. He believes that she is not going to tell anybody, go to the police. Logical. Yes. Did he know right from wrong? Yes, because of those statements. He also states, as you recollect, "What are you going to do about--what am I going to do --what are we going to do about your neck?", because of all the bad bruises around it. This is supposedly a person who at the same time didn't know he didn't do anything wrong, didn't know the consequences of his act. But yet he's worrying

about the marks on the neck. And also of course the statement that is so indicative of his frame of mind and his knowledge of what is occurring---he says "If I were a minor I wouldn't worry about it. But I'm not a minor." Here again, another statement which you'll notice neither of the defense psychiatrist would comment upon.

Another statement which indicates he knows what's going on-he knews if he was--knew if he was a minor he wouldn't have to worry about it, but since he is an adult he would. Again another indication of his mental state at the time he committed the act, that mental state being sanity, that mental state being knowledge of right from wrong and the consequences of his act. We cannot forget that in our determination of sanity or insanity in this case.

But let's go on from what she stated.

Let's go on to Officer Pilafant who took the stand, who the psychiatrists, both defense psyshiatrists, never even heard about, never even talked to. He states that he saw this fellow on the beach and that he went up to him, talked to him, and then arrested him for the offense. The fellow voluntarily put his arms behind his back and said he would go to the car. This is supposedly an insane person under the throws of an acute condition of schizophrenic paranoia at the time. He goes to the car and the officer reads him his Miranda rights. Does he say he doesn't understand them? Does he say "what's going on?" No. He says "I understand my rights. I do not want to speak to you. I want to speak to an attorney." Again an occasion of a person who knows what's going on around his surroundings, and knows

the consequences of his act. Even down --as going down the car as you recollect Officer Pilafant said he explained what Miranda rights meant and the guy said--and Mr. Greenfield said "I appreciate that, thanks a lot for telling me that." And here we are to believe that this person didn't know what he was doing at the time of the act, and then even down at the station, according to Detective Jolley--He's down there. He says, "Have you been read you Miranda rights?" "Yes, I have." "Do you want to talk?" "No." "Do you want to talk to an attorney?" "Yes." And after he talked to the attorney again he will not speak. Again another physical overt indication by the defendant--

MR. STEWART:

Your Honor, objection to that line of questioning.

THE COURT:

Can't hear.

MR. STEWART:

On final argument with regard to person's remaining silent. I think that's prejudicial error.

THE COURT:

May I see you at the bench?

(Off the record.)

THE COURT:

Objection is overruled. You may proceed.

MR. SLATER:

So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity. I apologize for saying guilt or innocence all the time. Insanity or insanity, because that is the sole issue before us today, not his guilt or innocence because

that has not been contested. So I believe before you should make any determination and even before you really think of what the doctors have said you must use your own judgment as a jury in determination of the sanity, because you alone are the judges of that. Not Dr. Piotrowski, Not Dr. Lose, Not even Dr. Gonzalez, because all they did was testify to what they felt. But you, the jury, are the sole persons who can determine whether or not this individual did know right from wrong at the time he committed this act.

And I contend, the state contends that there has been no evidence brought before this court which would instill in the jury's mind any indication that this individual did not know what he was doing at the time he committed the act, because of his own statements at the crime. He

indicated he knew it was wrong to do it, and that is all the jury has to determine.

I have two times to speak to you. Both this time and after in rebuttal--against Mr. Stewart. This is the way the courtroom procedure works. So I will save the rest of my argument until later on. Thank you.

[SR 329 - 341]